STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 23, 2006
v	No. 258336 Genesee Circuit Court
KEITH DEMOND THOMPSON, Defendant-Appellant.	LC No. 04-013556 – FH

Before: Donofrio, P.J., and Murphy and Kelly, JJ.

PER CURIAM.

Defendant was convicted after a jury trial of delivery of less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv), and maintaining a drug vehicle, MCL 333.7405(1)(d). Defendant appeals as of right both convictions. We affirm in part and reverse in part.

Defendant's convictions arose after the Genesee County Sheriff's Department received information from a confidential informant that a person by the name of "Dough" or "Doughboy," which is defendant's nickname, would be delivering drugs in a Little Caesar's parking lot on the evening of April 9, 2003. Over defendant's objections, the trial court allowed the police officers to testify to the substance of the confidential informant's tip in order to explain their conduct relative to surveillance of the restaurant's parking lot.

Defendant first argues that his conviction for maintaining a drug vehicle is not supported by sufficient evidence because there is no evidence that he kept or maintained the van he was driving at the time of the incident for the purpose of selling or keeping drugs. We agree. When reviewing the sufficiency of the evidence to sustain a conviction, this Court "'must view the evidence in the light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt.'" *People v Hunter*, 466 Mich 1, 6; 643 NW2d 218 (2002), quoting *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992).

MCL 333.7405(1)(d) provides that a person "[s]hall not knowingly keep or maintain a . . . vehicle . . . that is used for keeping or selling controlled substances in violation of this article." The statute does not define "keep or maintain." This Court has previously held that, to convict a defendant of keeping or maintaining a drug house under MCL 333.7405(1)(d), the defendant need only "exercise authority or control over the property for purposes of making it

available for keeping or selling proscribed drugs and to do so continuously for an appreciable period." *People v Griffin*, 235 Mich App 27, 32; 597 NW2d 176 (1999).

We decline the prosecutor's request to reconsider the holding in *Griffin*. The prosecution's assertion that the Court failed to deduce the Legislature's intent is incorrect. A review of *Griffin* shows that the panel employed the general principles of statutory construction and merely noted at the end of its analysis that the Court's conclusion was consistent with other jurisdictions' interpretations of to "keep or maintain" as used in the context of similar drug laws. *Id.* at 32-33.

The prosecution did not present evidence that defendant exercised authority or control over the white van for an appreciable period of time for the purposes of making the van available for selling or keeping drugs. The prosecution only presented evidence that defendant used the van for selling or keeping drugs on the night of April 9, 2003. Because defendant's conviction is not supported by sufficient evidence, we reverse defendant's conviction for maintaining a drug vehicle.

Next, defendant argues that the trial court erred in allowing police officers to testify to the substance of the confidential informant's tip because the tip identified and incriminated him, thus making it inadmissible hearsay which deprived him of his constitutional right of confrontation. Generally, this Court reviews a trial court's ruling regarding the admission of evidence for an abuse of discretion, *People v Hine*, 467 Mich 242, 251; 650 NW2d 659 (2002), but claims of constitutional error are reviewed de novo. *People v Geno*, 261 Mich App 624, 627; 683 NW2d 687 (2004).

The substance of a confidential informant's tip is generally inadmissible as hearsay. *People v Starks*, 107 Mich App 377, 383; 309 NW2d 556 (1981). Any testimony in regard to a confidential informant's tip should, at a minimum, be limited to a general, nonspecific statement that the officers were responding to a tip. *People v Wilkins*, 408 Mich 69, 73; 288 NW2d 583 (1980). This would provide the jury with an explanation of the police conduct. *Id.* The *Wilkins* Court addressed the admissibility of an informant's tip, where an officer was permitted by the trial court to testify in detail about the substance of the incriminating tip. The Court, reversing the defendant's conviction, concluded:

> Even if we were to accept (which we cannot) the argument that the evidence in question was relevant, the prejudice emanating from the introduction of such evidence far outweighed its probative value. The testimony, while bearing upon the reason why the officers acted as they did, also provided the jury with the content of an unsworn statement of an informant who was not produced at trial. This statement pointed to the defendant's guilt of the crime charged. Putting aside the confrontation problems which the admission of this statement engenders, the prejudicial impact of this evidence, offered for a limited purpose, is self-evident. [*Id.* at 74.]

Regarding confrontation problems, we note the United States Supreme Court's recent decision in *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004), in which the high Court held that an out-of-court statement by a witness that is testimonial in nature is inadmissible under the Confrontation Clause, US Const, Am VI, where the witness is

unavailable to testify and the defendant did not have a prior opportunity to cross-examine the witness, regardless of whether the statement is deemed inherently reliable. The informant's tip or statement to police would be testimonial in nature. See *Crawford, supra* at 51-52.

Here, the officers' testimony regarding the substance of the confidential informant's tip went beyond the non-hearsay purpose of explaining the police conduct, and the jury was presented with a statement from the informant which indicated that defendant would be delivering drugs in the restaurant parking lot. The admission of this evidence offended the rules of evidence as well as the Confrontation Clause. The trial court erred in allowing the testimony and in allowing the prosecutor to reference the substance of the informant's tip during closing argument.

Having found error, we nonetheless affirm the drug delivery conviction because the error was harmless beyond a reasonable doubt. In *People v Shepherd*, 472 Mich 343, 347; 697 NW2d 144 (2005), a case addressing an assumed violation of the Confrontation Clause, our Supreme Court stated that any "alleged error was not a structural defect requiring automatic reversal." Rather, the question is whether the alleged constitutional error was harmless beyond a reasonable doubt. *Id.* The Court ruled:

> Harmless error analysis applies to claims concerning Confrontation Clause errors[.] But to safeguard the jury trial guarantee, a reviewing court must "conduct a thorough examination of the record" in order to evaluate whether it is clear, beyond a reasonable doubt, that the jury verdict would have been the same absent the error. [*Id.* at 348 (citations omitted).]

The evidence concerning the substance of the informant's tip was not sufficiently damaging as to warrant reversal. We note that, if there had been only a vague or general reference to the tip, or if there had been no reference at all, the jury, in all likelihood, would still have speculated that the police had some information that a crime was going to be committed simply because of the fact that the police had set up surveillance of the Little Caesar's parking lot. There was testimony by a police officer that defendant admitted giving rock, crack cocaine to a female who had arrived at the parking lot in a separate vehicle and that the female had given defendant $50 that was owed to him. While defendant testified that he had not provided drugs to anyone, there was evidence that the female purchaser walked over to the van driven by defendant and entered the vehicle, that she then left the van and reentered her vehicle via the driver's side door of her car, that four rocks of cocaine were found on the driver's side floorboard of her vehicle, that there was a $50 bill in the van, that an empty baggie was found in the van which appeared to have been twisted in a manner typical of drug packaging, that defendant, upon making eye contact with an officer, ducked back into the driver's side of the van, and that defendant's passenger swallowed some cocaine. This evidence, when considered with the surrounding circumstances, provides strong corroboration of the confession given by defendant to police as it is consistent with his statement. We are confident that the jury's verdict would have been the same absent the error. Accordingly, any error was harmless beyond a reasonable doubt.

Finally, we have reviewed defendant's myriad claims of prosecutorial misconduct, and we conclude that, assuming some instances of arguably improper conduct, defendant has not

shown that he was deprived of a fair and impartial trial. *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003).

Affirmed in part and reversed in part. We do not retain jurisdiction.

/s/ Pat M. Donofrio
/s/ William B. Murphy
/s/ Kirsten Frank Kelly